IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1045

FRANZ J. TOMASINO,

Petitioner,

V.

STATE OF CALIFORNIA,

Respondent.

ON PETITION
FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below and Jurisdiction

The opinions below are included as an

Appendix to the Petition. It also adequately sets out the basis for certiorari jurisdiction.

QUESTION PRESENTED

In respondent's view, the sole question is whether the United States District Court acted properly in remanding, on its own motion and without a hearing, a state criminal prosecution (designated People of the State of California v. Tomasino) to the state courts.

The case had been removed to the United States District Court by petitioner's act of filing a removal petition under 28 U.S.C. 1443(1): i.e., he claimed violation of his Federally protected civil rights.

Nature of the Underlying Criminal Prosecution and Petitioner's Objection Thereto.

This is concisely set out by the majority opinion of the Court of Appeals, which we quote (from first paragraph),

with the additional notation that California Vehicle Codes section 23101 is commonly known as "drunk driving":

> "He [petitioner] claimed that the statute under which he was being prosecuted (California Vehicle Code section 23101) was violative of the equal protection clause because punishment for any particular act could vary from that for a felony (a prison term) to that for a misdemeanor (a jail term plus a fine), depending upon the 'whim or caprice' of the court."

ARGUMENT

IT IS SETTLED LAW THAT THE UNITED STATES DISTRICT COURTS HAVE DISCRETION TO REMAND SOME CASES WITHOUT HOLDING HEARINGS

The People submit that petitioner's

removal petition was clearly lacking in merit. Accordingly, if it is proper for United States District Courts to remand any cases on their own motions, and without holding of any hearing, this case would be an appropriate one for such action.

We submit that this is precisely the sort of unmeritorious removal case which was foreseen in City of Greenwood v. Peacock, 384 U.S. 808, wherein the reasons for allowing summary remand were indicated as follows (at 384 U.S. 832-833; footnotes omitted):

"In the fiscal year 1963 there were 14 criminal removal cases of all kinds in the entire Nation; in fiscal 1964 there were 43. The present case was decided by the Court of Appeals for the Fifth Circuit on June 22, 1965, just before the end of the fiscal year. In that year, fiscal 1965, there were 1,079 criminal

removal cases in the Fifth Circuit alone. But this phenomenal increase is no more than a drop in the bucket of what could reasonably be expected in the future. For if the individual petitioners should prevail in their interpretation of section 1443(1), then every criminal case in every court of every State - on any charge from a five dollar misdemearnor to first-degree murder - would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the state court. On motion to remand, the federal court would be required in every case to Hold a hearing, which would amount to at least a preliminary trail of the motivations of the state officers who arrested and charged the defendant,

of the quality of the state court or judge before whom the charges were filed and of the defendant's innocence or guilt. And the federal court might, of course, be located hundreds of miles away from the place where the charge was brought. This hearing would be followed either by a full trial in the federal court, or by a remand order. Every remand order would be appealable as of right to a United States Court of Appeals and, if affirmed there, would then be reviewable by petition for a writ of certiorari in this Court. If the remand order were eventually affirmed, there might, if the witnesses were still available, finally be a trial in the state court, months or years after the original charge was brought. If the remand order were eventually reversed, there might finally be a trial in the federal court, also months or years after the original charge was brought."

We submit that, in rejecting a broad construction of the substantive provisions of the removal statute, largely because of the dangers of a flood of meritless petitions (as indicated by the above quotation), City of Greenwood v. Peacock, supra, must also be deemed by implication, to have rejected procedural requirements which could, in effect, negate this construction. For if this court in rejecting a construction of the law which would allow "every case . . . from a minor misdemeanor . . ." to be removed to the Federal courts, we submit it must also, by clear implication, allow some sort of summary remand when meritless cases are removed. For removal occurs automatically, on filing the petition. Thus it must be proper to remand such cases in a summary manner, without a hearing. Surely if every litigant, in even the most minor traffic case, can

make his matter, literally, a Federal case -- then the dangers cited will occur simply by reason of the hearings required to remand these cases. As this procedural construction would establish exactly the state of affairs rejected by City of Greenwood v. Peacock, supra, we submit that this - the procedural construction urged by petitioner, of requiring a full Federal hearing in every case before remand, no matter how lacking in merit the removal was, must also be deemed to have been rejected by this Court.

CONCLUSION

We submit that, as the claim urged by petitioner has already been rejected by this Court by very clear implication, this case does not present a legal issue warranting grant of certiorari.

Accordingly, it is requested that the petition for the writ be denied.

Respectfully submitted,

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